"investigation could potentially affect [his] qualifications," *Opposition* at ¶ 26; rather, it forcefully stated: "Based on these allegations, we need more information to determine whether you are qualified to be a Commission licensee." *Request* at Exhibit JAK-1, p. 1. Thus, the Bureau had already made at least a prima facie determination that Kay was unqualified, based on nothing more than unsupported and conclusory allegations from biased competitors and enemies of Kay.

44. The Bureau argues, however, that there is nothing improper in its reliance on information received from competitors in discharging its enforcement duties, and it quotes a pleading by undersigned urging that competitors had standing to intervene in FCC licensing proceedings as "private attorneys general."[13] *Opposition* at ¶ 27. But it is absurd to jump from the accurate premise that a competitor's private economic interest gives it standing in a Title III licensing proceeding to the unlawful conclusion that the Bureau may form judgments and come to conclusions (even if only preliminary) as to the qualifications of a licensee based solely on unsupported and conclusory allegations from biased competitors. In the "private attorney general" cases referred to, the licensees had the opportunity to confront and respond to Section 309 challenges to their applications and Section 402(b) appeals from their license grants. But the Bureau had already formed judgments that Kay's qualifications were at issue before Kay even knew the identity of the informants against him or the content of their complaints.

[13] The theory is that while an administrative agency such as the Commission deals only in the public interest, and does not adjudicate disputes involving purely private interests, a party's private interest may nonetheless give it standing to intervene in and appeal from rulings in agency licensing proceedings. This can assist the agency in its enforcement activities because competitors have an incentive to expose potential wrongdoing that might not otherwise come to the agency's attention. *See FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940), *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1941), *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30-31 (D.C. Cir.), Such private sector intervenors are referred to a "private attorneys general," *Association of Data Processing Service Organizations. v. Camp*, 397 U.S. 150, 153 n.1 (1970), or sometimes as a of "King's proctor." *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 28 (D.C. Cir. 1941).

B. The Bureau's Improper Efforts to Damage Kay's Business and Reputation

(1) Distribution of the Section 308(b) Letter

45. Concurrently with sending the Section 308(b) request to Kay, the Bureau sent blind copies to several of Kay's competitors, customers, potential customers. and/or co-channel licensees. These parties immediately started using the Bureau's letter to defame Kay in the Los Angeles land mobile radio community. *Request* at ¶ 61. The Bureau dismisses this, hiding behind the technicality that this was not a restricted proceeding and arguing that the Bureau therefore did not violate *ex parte* rules by releasing the letter. *Opposition* at ¶ 30. The complaints against Kay did not become restricted proceedings only because the Bureau unilaterally chose not to serve copies of the complaints on Kay. The Bureau conveniently deflects the charge by relying on a decision that was exclusively within the Bureau's control.[14]

46. While the Bureau may have the discretion to keep the identity of informants confidential, Sobel respectfully submits that this discretion should be exercised with a great deal of circumspection when the so-called "informants" are actually business competitors who stand to have their personal interests significantly enhanced by getting another licensee in trouble. The Bureau conveniently ignores the fact that the chief complainants against Kay were competitors who would directly benefit from a Commission action withdrawing any of Kay's authorizations. Such action would (a) remove encumbrances from the complainants' own authorizations, (b) free the channel for possible application by the complainants', and/or (c) remove or diminish competition from Kay. In these circumstances the Bureau had a public interest duty not to hide behind technicalities, and it was certainly improper for the Bureau to choose sides and allow itself to be used as a weapon in this competitive skirmish.

[14] To the best of Sobel's knowledge, with the possible exception of Chris Killian, none of the complainants against Kay who were also competitors requested that their complaints be kept confidential.

2. Kay's Request for Confidentiality

47. The Bureau claims that it sufficiently assured Kay of confidentiality when Hollingsworth stated in one of his letters to Kay that "materials which include any information containing trade secrets or commercial, financial, or technical data that would customarily be guarded from competitors, will not be made routinely available to the public." *Opposition* at ¶ 29. What that meant, however, is that the information would be subject to possible FOIA requests by Kay's competitors.[15] The Bureau, by sending blind copies of the Section 308(b) letters, alerted Kay's competitors and enemies and advised them specifically what information was being requested, making it a simple matter for them to submit FOIA requests seeking it. Kay thus reasonably feared that the Bureau had set the stage for his competitors to obtain his customer list, solicit his customers, and destroy his business. And, if the Bureau decided in response to such a FOIA request to release the information over Kay's objection (assuming the Bureau even bothered to inform Kay of the request), there would be little Kay could do to prevent the ultimate release of the information.

48. The Bureau states that "[u]nless Kay expected the Bureau staff to break the law in order to accommodate his wishes, he had no right to expect further assurances." *Opposition* at ¶ 29. But this is an overstatement. The "law" simply requires that the Commission release information that is not privileged or subject to an exception upon receipt of a valid FOIA request. Keep in mind that the Bureau was seeking a vast amount of information, including Kay's complete customer list. There is no law that would have prevented the Commission from narrowing the scope of its document request to Kay, to arrange for in camera inspection of the requested information, or to make other arrangements designed to alleviate Kay's justified and

[15] Indeed, the language used by Hollingsworth parrots the Commission rule implementing the FOIA. Section 0.461 of the Rules is entitled, "Requests for inspection of materials not routinely available for public inspection." 47 C.F.R. § 0.461.

understandable confidentiality concerns. Moreover, when he received Hollingsworth's May 20, 1994, letter, Kay knew that the Bureau had already released the 308(b) request to his competitors who were using it against him, and he knew that Anne Marie Wypijewski ("Wypijewski"), a Bureau staff attorney, had already attempted to sabotage him by communicating behind his back with a party to a finder's preference proceeding in which Kay was involved. *See* Section IV.A.3, *infra*. The Bureau certainly did nothing to reassure Kay, and the actions that it did take make it clear that certain members of the Bureau staff had absolutely no intention of keeping the most important trade secrets of Kay's business from Kay's enemies.[16]

(3) The Thompson Tree Matter

49. Sobel demonstrated that Wypijewksi, a Bureau employee, had improperly communicated on an *ex parte* basis with Thompson Tree, a party to a finder's preference proceeding to which Kay was also a party, and provided specific strategic information that could have been used to undermine Kay's posture in that matter. *Request* at ¶¶ 62-68.[17] The Bureau attempts to excuse her blatant misconduct, asserting a hyper-technicality. The Bureau argues that it was independently investigating Thompson Tree's possible nonconstruction, that the Hollingsworth letter and the Wypijewski follow-up had nothing to do with the finder's preference request. *Opposition* at ¶ 32. What the Bureau conveniently omits is that the so-called "independent" investigation was prompted by a letter from Kay dated September 18, 1993, and

[16] Kay was well aware of the serious danger his enemies could do to his business when they identified his customers. Kay was already involved in a law suite, commenced in August of 1993, against Harold Pick for illegal acts committed by Pick to Kay's customers. Moreover, Kay was aware that Pick and other were already using the fact of the Section 308(b) request (which Wypijewski informed them of by sending blind copies) to defame Kay in the Los Angeles land mobile radio business community.

[17] The Bureau correctly notes a discrepancy in the dates recited by Sobel and points out that Hollingsworth's December 23, 1993 letter to Thompson Tree was the result of an independent investigation, not Kay's finder's preference request. *Opposition* at ¶ 31.

directed specifically to the attention of Wypijewski.[18] Thus, as the one who filed the "complaint," Kay was very much a party-in-interest with respect to the investigation. Hollingsworth of course did not serve Kay with a copy of his December 23, 1993, letter. Compare this to the Bureau's dissemination of six blind copies of the 308(b) letter to Kay. Thus, the Bureau's claim that it "routinely provides complainants with information concerning the status of investigations," *Opposition* at ¶ 30, is apparently another one of those things that is true only for parties other than Kay and Sobel--or it is yet another Bureau statement that is *not* true.

50. In any event, assuming arguendo that Wypijewski was calling about the so-called "independent" investigation, her communications with Thompson Tree had a very direct bearing (and intentionally so) on Kay's pending finder's preference request. Indeed, Wypijewski specifically discussed the finder's preference request in the conversation, confirming her own understanding that there was a connection between the two. Whether or not this fits precisely within the four corners of the applicable *ex parte* regulations, it can not be denied that it is highly improper for a Bureau staff member to take sides in a licensing matter, specifically providing unsolicited advice to one party how to strategically outmaneuver the other. Yet, that is precisely what Wypijewski did.[19]

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[18] The Bureau's denial of Kay's finder's preference request on the grounds of an independent investigation is thus another example of its negative animus toward Kay. The investigation was not independent, it was in fact prompted by Kay's own complaint.

[19] The Bureau makes the fantastic argument that Kay has no basis to complain about Wypijewski's April 29 attempt at a further *ex parte* contact with Thompson Tree because his finder's preference request had been denied on April 25, 1998. *Opposition* at 32. This argument fails on two counts. First, it utterly ignores the successful *ex parte* contact on April 18, 1994, while Kay's finder's preference request was still pending. Second, the prohibition on *ex parte* communications did not end with the dismissal of Kay's finder's preference request. Kay had until at least June 25, 1994 to seek reconsideration or review of the Bureau's action, and the *ex parte* restrictions continued during that period.

(4) The Pro Roofing Incident

51. The Bureau erroneously asserts that Sobel offers "no evidence whatsoever" in support of his charge that the Bureau staff interfered with a criminal investigation of Pick for theft of service from Kay's repeater. *Opposition* at ¶ 23. This is simply not true. Sobel presented clear and fully documented evidence that the police sloughed off a clear case of criminal theft of service after being provided by the Bureau with certain "confidential information" regarding the Bureau's investigation of Kay. *Request* at ¶¶ 69-74. While the causal link may be circumstantial, it is nonetheless compelling. The information relating to just what was communicated between the Bureau and the police is uniquely within the control of the Bureau. Only by a full investigation can the matter be properly evaluated. Moreover, if the Bureau were as innocent in this incident as it claims, why was Kay's complaint regarding this serious matter totally ignored by the Commission's field personnel?[20]

C. The Use of Designation and Discovery as a Weapon Against Kay

52. In attempting to respond to Sobel's charge that the Bureau used the *Kay HDO* as a weapon against Kay, *Request* at ¶¶ 75-76, the Bureau once again reverts to the tired refrains that Sobel does not have standing to challenge the *Kay HDO* and that this is not the proper forum for doing so, *Opposition* at ¶ 35, and that Sobel's assertions are an improper attempt to seek reconsideration of the *Kay HDO*, id. at ¶ 36. Sobel therefore once again reiterates that he is not directly challenging the *Kay HDO* or the merits of that proceeding. Rather, he is pointing to the fact of the *Kay HDO* and to demonstrated facts regarding its adoption as evidence of the Bureau's bad faith and bias toward Kay.

[20] It is well established that during this time frame Hollingsworth and other Bureau staff members were in frequent contact with the Commission's Cerritos field office regarding matters involving Kay.

53. The basis of Sobel's charge is that the Bureau had no evidence of the charges in the *Kay HDO* beyond the alleged Section 308(b) violation. The Bureau counters that "Sobel appear[s] ... to be acting under the mistaken apprehension that the Bureau or the Commission must have conclusive evidence of wrongdoing before they can designate a license for hearing." *Opposition* at ¶ 36.[21] Sobel harbors no such misconception and that is not what he argued. Rather, Sobel showed that Hollingsworth himself, in his own memorandum accompanying a draft of the *Kay HDO*, expressly admitted not having evidence on the alleged violations and expressly stated his intention to use discovery in the hearing proceeding as a means of acquiring such evidence. *Request* at ¶ 76. It is interesting to note that in the Kay proceeding, the Bureau to this day resists providing Kay with a bill of particulars, and many of the persons identified by the Bureau as having information regarding the alleged violations (some of them still current hearing witnesses), when questioned under oath, deny having any such knowledge.

D. The Bureau's Failure to Verify Accusations of Biased Informants

54. Sobel demonstrated that Hollingsworth, in connection with the Kay proceeding, solicited from Harold Pick a sworn statement containing the false accusation that Kay had stolen repeaters from Pick's Saddle Peak site, an allegation that Hollingsworth would have found to be false with only minimal efforts at verification. *Request* at ¶¶ 77-84. The Bureau offers several inadequate responses.

55. First, the Bureau attempts to diminish the significance of the matter by characterizing it as merely "a single passage in a paragraph of a witness statement." *Opposition*

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[21] The Bureau curiously supports its argument with a reference to Section 309(e) which establishes a "substantial and material question of fact" standard, and places the burdens of proceeding and proof on the applicant. 47 U.S.C. § 309(e), *Opposition* at ¶ 36. But Kay's hearing was designated pursuant to Section 312 of the Communications Act which requires the Commission to provide the licensee with "a statement of the matters with respect to which the Commission is inquiring," 47 U.S.C. § 312(c), and which places the burdens of proceeding and proof on the Commission, not the licensee, 47 U.S.C. § 312(d).

at ¶ 37. That so-called "single passage," however, falsely accuses Kay of a felony, and Hollingsworth was all to ready to accept it as gospel without any attempt at verification or corroboration.

56. Next the Bureau urges that the Pick statement is a "meaningless document" because the Bureau had not affirmatively used it and does not intend to call Pick as a witness. *Opposition* at ¶ 38. This entirely misses the point. There is no disputing that the statement was obtained for possible use against Kay; this much is clear from the statement itself, *Request* at Exhibit HP-5, and from Hollingsworth's transmittal letter to Pick, *id.* at Exhibit HP-4. We have only the Bureau's unverified word that "Mr. Hollingsworth had Harold Pick swear to the statement in writing, and the Bureau then evaluated the statement and decided not to use it."[22]

57. The Bureau attempts to deflect responsibility from Hollingsworth, arguing that "[t]he statements in question were sworn to by Pick, not Hollingsworth." *Opposition* at ¶ 39. But this leaves unanswered the question why Hollingsworth was soliciting a sworn statement from an individual who had already been conclusively demonstrated, less than three months earlier, to have submitted a false declaration and forged documents to the Commission. See *Request* at ¶¶ 32-36. Hollingsworth apparently was the primary investigator against Kay, and Hollingsworth is known to have had direct contact and involvement with virtually every witness and potential witness against Kay, including personal meetings during two trips to California by Hollingsworth. In these circumstances, that the Bureau would so cavalierly dismiss the slovenly

[22] Absent a full investigation, there is no way of knowing how this and other mistaken, inaccurate, false, and even perjured information collected by Hollingsworth from all the informants against Kay (some of them current hearing witnesses) have been used internally to fuel the Bureau campaign against Kay. In response to Kay's protestations of innocence and accusations of Bureau misconduct, Hollingsworth can conveniently point to his arsenal of false information about Kay to mollify his superiors and colleagues by demonizing Kay.

manner in which he handled the Pick witness statement is itself confirmation that the Bureau is willing to trample the truth in its quest for Kay's head.

E. Coaching and Soliciting False Statements from Potential Witnesses

58. It was perhaps Sobel's most damning documented allegations against the Bureau and Hollingsworth that drew the weakest response. Sobel demonstrated that in soliciting a sworn statement from Mr. Richard L. Lewis, Hollingsworth coached the witness to implicate Kay regarding things that were not only untrue, but that were not within Lewis's knowledge or even his belief prior to being so-coached by Hollingsworth. Specifically, Hollingsworth prepared for Lewis's signature a sworn statement asserting that Kay had (a) engaged in intentional malicious interference to the operations of the Fullerton School District, (b) that Kay had improperly and clandestinely converted the School District's license from a GP to a GB, and (c) that Kay had improperly and clandestinely converted the School District's authorization from a community repeater license to an SMR end user license. *Request* at ¶¶ 85-99.

59. When Lewis was examined under oath it was learned that (a) he had no independent knowledge of these matters prior to being coached by Hollingsworth, (b) he did not believe the problems experienced by the School District were caused by anything other than a validly operating co-channel licensee, much less the result of intentional interference by Kay, (c) he did not understand the conversion of the School District's authorization from GP to GB , nor its conversion from a community repeater to an end user, but he was told by Hollingsworth that Kay had "snookered" the School District out of a valuable license, and (d) he personally did not believe "Mr. Kay did anything wrong, improprietous or unethical in his business dealings" with the School District. *Request* at ¶¶ 85-99. Further examination of Commission records, which the Bureau should have had in its own files, revealed that the conversion of the license from a GP to a GB happened well before Kay had any involvement with the station whatsoever, and that the

conversion of the authorization from a community repeater to an SMR end user license was done above board with full and completed copies provided to the School District prior to signature, and that this procedure was not only proper, it was actually required by Commission rules. *Id.*

60. Sobel has already said this before, but he will say it again. The fact that the Bureau does not intend to call Lewis as a witness, *Opposition* at ¶ 40, is irrelevant, and the assertion that the Bureau has not used the Lewis statement, *id.*, is impossible of verification absent the investigation sought by Sobel. What is highly relevant, however, is that Hollingsworth, the chief investigator against Kay, was feeding a witness information that he knew or should have known to be false, that the witness had no independent knowledge, understanding, or belief of the matters prior to being so coached, and that Hollingsworth then asked the witness to swear to these matters under oath.[23] The issue here is not the probative value of the Lewis witness statement--it has none. Rather, the issue is that Hollingsworth's willingness to suborn such false sworn statements is compelling evidence of the bad faith with which the Kay revocation has been and continues to be prosecuted.

61. The Bureau argues as follows:

> Mr. Lewis testified ... that he believed his written statement was true and correct. ... It is clear that Sobel's argument is not with the statement but with any possible inferences to be drawn from that statement about Kay's conduct.

Opposition at ¶ 40. Sobel does not doubt Lewis's good faith, but there is no denying that his statement contained false assertions that were fed to him by Hollingsworth. Lewis's candor is not the issue--but the inaccuracies in his statement, and the way they came to be there, are evidence of bad faith on the part of Hollingsworth and the Bureau.

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[23] The relevance of the Lewis statement is magnified by the facts that (a) Hollingsworth instigated and advocated the proceedings against Kay, and (b) Hollingsworth had direct contact with virtually every other complainant, informant, potential witness (including current hearing witnesses) against Kay, including personal meetings during two trips to California.

62. The Bureau tries to skirt the issue by claiming that it "had other information before it (which, to its knowledge, Kay does not have in his possession), which tended to show that Kay deliberately caused interference to the School District and that he was involved in changing the School District license to a general business license." *Opposition* at ¶ 40. The Bureau of course offers no support for this self-serving assertion, but if it is true the Bureau has improperly withheld such information from Kay in discovery in WT Docket No. 94-147--a further indication that its interest is not in finding the truth and doing justice, but rather in sandbagging Kay.

63. Whether or not it uses Lewis as a witness, and whether or not it has "other" information, the fact remains that the Bureau, by the sworn declaration of two of its attorneys, including Hollingsworth, represented that Lewis had information regarding intentional interference and abuse of process by Kay. *Request* at ¶ 86. His deposition made clear, however, that he had no such information beyond the false coaching he received from Hollingsworth. To this the Bureau's limp response is: "the Bureau's [interrogatory] answers were designed to put Kay on notice as to the universe of allegations against him." *Opposition* at ¶ 40. But that is not the way the Bureau characterized its response at the time. The Bureau expressly stated, and two of its staff, including Hollingsworth, so swore under penalty of perjury, that Richard Lewis was "believed to have knowledge of instances of deliberate and/or malicious interference," *Wireless Telecommunications Bureau's Response to Kay's First Set of Interrogatories* (served on March 8, 1995 in WT Docket No. 94-147) at p. 16, Response 4-1, and "direct knowledge of relevant facts relating to instances of abuse of process." *Id.* at p. 19, Response 5-1.[24] Hollingsworth was the one who met with Lewis in Cerritos, so he must have known that Lewis had no such knowledge

[24] For some inexplicable reason, the Bureau limits its retort to its identification of Lewis as one with knowledge on the interference issue. The Bureau also certified that Lewis had knowledge of abuse of process by Kay.

beyond that fed to Lewis by Hollingsworth. If the Bureau knew that Lewis lacked the attributed knowledge, then its interrogatory responses were perjured.[25] If the Bureau is claiming that it learned later that Lewis lacked the attributed knowledge (hence, its decision not to use him as a witness), then the Bureau has failed to keep its interrogatory responses current. In either event, the bad faith toward Kay is obvious.

WHEREFORE, it is respectfully requested that the Commission initiate an investigation or inquiry, pursuant to Section 403 of the Communications Act of 1934, as amended, 47 U.S.C. § 403, into the facts and circumstances surrounding the designation and prosecution of the captioned proceeding; that Sobel be made a party to the proceeding and afforded full discovery rights; and that, upon conclusion of thereof, the Commission fashion appropriate relief.

Respectfully submitted this 23rd day of March 1998,

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[25] Inconsistently, the Bureau seeks revocation as a sanction against Sobel for an alleged lack of candor. Yet the Bureau believes that it, with impunity, can misrepresent to the Commission, to the presiding judge, and to the other parties to suit its own strategic litigation purposes. *See, also* ¶¶ 14-18, *supra*. Equity demands that the Bureau not place itself above the law it seeks to impose on Sobel.

CERTIFICATE OF SERVICE

I, Robert J. Keller, counsel for Marc D. Sobel d/b/a Air Wave Communications, hereby certify that on this 23rd day of March, 1998, I caused copies of the foregoing *REPLY TO OPPOSITION* to be hand delivered, except as otherwise indicated below, to the officials and parties in WT Docket No. 97-56, as follows:

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